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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DEPARTMENT OF ALCOHOL
BEVERAGE CONTROL,

Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD,

Respondent;

TRADER JOES COMPANY,

Real Party in Interest.

A156879

(Alcoholic Beverage Control Appeals
Board No. AB-9707)

The Department of Alcoholic Beverage Control (the Department) petitioned for a writ of review to annul the decision of the Alcoholic Beverage Control Appeals Board (the Board) and reinstate the Department's decision to impose a 10-day suspension of the liquor license of real party in interest Trader Joes Company, dba Trader Joes #236 (Trader Joes), after its clerk sold alcohol to a minor who presented a fake driver's license.¹ The Department argues the Board exceeded the appropriate scope of review by reweighing the evidence and failing to give proper deference to the administrative law judge's (ALJ) factual findings. It further contends the Board erroneously concluded the

¹ In the context of the liquor laws, "minor" means someone underage for purposes of buying, possessing, or drinking alcohol. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1438, fn. 4 (*Masani*).)

Department issued “underground” regulations that were not promulgated under the Administrative Procedures Act (Gov. Code, § 11340 et seq.) (APA). We agree with both contentions. Therefore, we vacate the decision of the Board and affirm and reinstate the Department’s decision.

FACTUAL AND PROCEDURAL BACKGROUND

We take the facts from the testimony before the Department’s ALJ and from the factual findings set forth in the ALJ’s proposed decision of March 5, 2018, which was subsequently adopted by the Department.

On May 4, 2017, Trader Joes employee Riley Boulger sold two six-packs of beer to Julia Stafford, who was 19 years old at the time. The two were acquaintances, and Boulger knew that Stafford was a student at nearby San Francisco State University but did not know her age. During the sale transaction, Boulger asked Stafford for identification, and she presented a fake South Carolina driver’s license showing her to be 21 years old.² Boulger viewed the fake license through a plastic window in Stafford’s wallet and entered the indicated birthdate into the cash register.

The sale was witnessed by Department agent Michelle Ott, who along with agent Daniel Louis, happened to be working there undercover “looking for potential violations.” According to Ott, this particular store location was “an easy place for minors to access alcohol.”³ Ott noticed Stafford because she “looked really youthful” and was carrying alcoholic beverages to a check stand, and Ott overheard Stafford ask a companion, “ ‘do you think he will check?’ ” Ott watched as Stafford opened her wallet and Boulger leaned in to within two feet of the fake license and looked at it for “for one second or less” before continuing with the sale. Ott testified that Stafford appeared to be “[d]efinitely under 21” years of age.

² The fake license contained Stafford’s actual photograph, her correct height and weight, and the correct month and day of her birth date, but the birth year was changed to make her 21 years of age, and the signature was not hers.

³ We note, however, that there was no record of any prior departmental discipline against this Trader Joes location.

Ott confronted Stafford after she exited the store, identified herself as a police officer, and inquired about Stafford's age. Stafford stated she was 21 years old and presented the fake driver's license. Ott examined the fake license and noticed the laminate overlay on the picture side had a crooked edge and an "orange peel" or "undulating" texture, which was "typical for a fake ID." Additionally, Ott observed a raised ridge in the middle of the fake license running from top to bottom and a "cross" shaped ridge on the left side.⁴ Finally, Ott noticed that Stafford's hair color in the fake license was blonde, but her hair on the day of the incident was black.

After examining the license, Ott told Stafford she thought it was fake. Stafford then retrieved her actual license, which showed her to be underage. Ott issued Stafford a citation for possession of alcohol as a minor and possession of a false identification. Ott then returned to the store, informed Boulger he had just sold alcohol to a 19-year-old, and issued him a misdemeanor citation.

Boulger testified the store's policy was to require clerks to check the identifications of all alcohol purchasers if they appeared to be younger than 40 years old and to call a manager if a license appeared fraudulent. Consistent with this policy, Boulger asked to see Stafford's identification and entered her date of birth into the cash register. He was "[n]ot very" familiar with South Carolina licenses, but he did not see anything irregular about Stafford's identification. On prior occasions when Boulger encountered suspicious identifications, he called his manager.

Boulger further testified that at the time of the sale to Stafford, he had not been instructed by management to remove identifications from wallets. However, "[d]uring the time of the incident" with Stafford, management began delivering instructions "per the agent" that clerks should check identifications thoroughly and "handle them," but word of this new policy simply had not made its way to Boulger in time to affect the transaction at issue. Boulger did not identify the agent in question, but Ott testified that

⁴ Although agent Ott admitted she did not mention these ridges in her incident report, she testified that the ridges were present on the fake license before it was manipulated in post-incident examinations.

Louis told her he had advised managers to tell cashiers to remove identifications from customers' wallets.

Trader Joes presented testimony from Susan Dworak, an expert in verifying identifications. Dworak opined that Boulger reasonably relied on the fake license in question because it was "a very, very good fake." It had the correct size, material, opacity, thickness, flexibility, smooth corners and high-grade laminate as an authentic government-issued identification. Dworak further testified that genuine licenses from some states have an orange-peel-like texture and can sometimes have crooked laminate. When asked whether the creases in Stafford's fake license should have triggered suspicion, Dworak responded, "[i]t depends," but she did not recall the details of the crease or the presence of the cross-shaped crease. Dworak further opined that a crease is "not an absolute indication" of a fake identification.

The ALJ issued a proposed decision sustaining the Department's single count for violation of Business and Professions Code section 25658, subdivision (a),⁵ and imposing a 10-day suspension of Trader Joes' liquor license. The ALJ found that Trader Joes failed to establish an affirmative defense under section 25660⁶ because Boulger performed a cursory visual inspection of the fake license while it remained in Stafford's wallet.

Specifically, the ALJ found that Stafford "appeared youthful and as someone who just might or might not be 21 years old." Although her fake license had features consistent with an authentic South Carolina driver's license, the crease in the middle of

⁵ All further statutory references are to this code unless otherwise stated. Section 25658, subdivision (a), makes it a misdemeanor for any person to sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to a person under 21 years of age.

⁶ This statute provides in pertinent part: "Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon." (§ 25660, subd. (b).)

the license was “easily discernible” and “an obvious defect in the card’s manufacture or construction,” and both creases were “apparent physical irregularities or defects” that were “present when Agent Ott seized the false identification from the minor.” Had Boulger taken a closer look at the identification or physically examined the false identification, he would have discerned that the creases were suspicious. Finally, the ALJ found it relevant that Boulger knew Stafford attended San Francisco State University, and that such institutions have a high percentage of students who were just under, at, or just over the age of 21.

The Department adopted the ALJ’s proposed decision. Trader Joes appealed to the Board, arguing that the decision was not supported by substantial evidence, and that the Department had issued underground regulations in violation of the APA. The Board agreed, finding the Department erroneously applied a “ ‘take-it-out-of-your-wallet’ rule” for licensed premises near universities that was not supported by law, past cases, store policy, or industry standards. The Board further held that the Department issued two underground regulations that warranted reversal of its decision: first, agent Louis’s oral instruction to Trader Joes managers to remove identifications from customers’ wallets during alcohol sales; and second, the ALJ’s decision itself that identifications should be scrutinized more carefully during alcohol sales when the licensee is near a university.

The Department petitioned for a writ of review, which we granted. (§ 23090.)

DISCUSSION

In writ matters such as this, we review the decision of the Department, not of the Board. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1072.) The Department’s findings must be sustained if they are supported by substantial evidence, and neither the Board nor the courts may disregard or overturn a finding of fact by the Department simply to reach a contrary finding, even if equally or more reasonable. (*Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 (*Lacabanne*).) Our function is merely to determine whether the Department’s findings are supported by substantial evidence, and in doing so, we must resolve all conflicts in the evidence in

favor of the Department's decision and indulge in all legitimate and reasonable inferences to support it. (*Ibid.*)

A. The Affirmative Defense Under Section 25660

"[R]eliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious." (*Kirby v. Alcoholic Bev. etc. App. Bd.* (1968) 267 Cal.App.2d 895, 897.) "The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent man would have acted under the circumstances." (5501 *Hollywood, Inc. v. Dept. Alc. Control* (1957) 155 Cal.App.2d 748, 753 (5501 *Hollywood*).) Whether or not a licensee has made a reasonable inspection of an identification to determine that it is bona fide is a question of fact. (*Id.* at pp. 753–754.) The affirmative defense under section 25660 must be narrowly construed, and the burden is on the licensee to establish all of its elements. (*Lacabanne, supra*, 261 Cal.App.2d at p. 189.)

In adopting the ALJ's decision, the Department made a factual determination that Boulger did not conduct a reasonable inspection of Stafford's fake license based on several factors, including Stafford's youthful appearance, Boulger's knowledge that she was a university student, his unfamiliarity with South Carolina driver's licenses, and his brief visual inspection of the fake license from two feet away. The emphasis on Stafford's youthful appearance was certainly relevant to the merits of the defense (5501 *Hollywood, supra*, 155 Cal.App.2d at p. 753), and the Department's finding was supported by Ott's testimony that Stafford "[d]efinitely" appeared to be underage at the time of the incident. While Stafford's status as a university student did not necessarily demonstrate her ineligibility to purchase alcohol, when combined with the evidence of her youthful appearance, it supported a fair probability that she was underage. Based on the totality of this evidence, the Department reasonably determined that a cursory visual inspection of the license from a distance was insufficient. And because substantial evidence supported the Department's determination of this bona fide question of fact, it

was entitled to deference, even if the Board could reasonably have ruled differently on its own. (*Lacabanne, supra*, 261 Cal.App.2d at p. 185.)

In this regard, the Board was bound by the Department’s factual determination that there were observable physical defects, including the easily discernible ridges or creases present on the fake license at the time of the incident, as supported by agent Ott’s testimony. (*Masani, supra*, 118 Cal.App.4th at pp. 1445–1446.) Thus, the Board’s determinations that “[t]here was nothing about the ID that would lead [Boulger] to believe the ID was fake,” and that the defects identified by the Department were merely “minor imperfections” in the fake license, amounted to an improper reweighing of the evidence that failed to give proper deference to the Department’s decision.

Finally, we reject the Board’s conclusion that the Department erroneously applied a “ ‘take-it-out-of-your-wallet rule’ ” based solely on the store’s proximity to a university. Indulging all reasonable inferences in support of the decision, we conclude the Department found it necessary for Boulger to remove the license from the wallet, not because a rule required it, but because the case-specific facts reasonably aroused suspicion regarding Stafford’s age and the validity of the license she presented.

B. Underground Regulations

Trader Joes additionally contends that agent Louis’s verbal instruction to the store managers, and the Department’s decision that identifications should be scrutinized more carefully during alcohol sales when the licensee is near a university, amounted to agency regulations that are invalid due to noncompliance with APA procedures.

If a rule constitutes a “regulation” within the meaning of the APA, it may not be adopted except in conformity with certain procedural requirements such as public notice and opportunity to comment. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333 (*Morning Star*).) Any regulation that substantially fails to comply with these requirements may be judicially declared invalid. (*Ibid.*)

As used in the APA, a regulation includes every rule, regulation, or order of general application or any supplement of a rule, regulation, or order adopted by any state agency to implement, interpret, or make specific the law that it enforces or administers,

or that governs its procedure. (*Morning Star, supra*, 38 Cal.4th at p. 333, citing Gov. Code, § 11342.600.) An “underground regulation” is “any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.” (Cal. Code Regs., tit. 1, § 250, subd. (a).)

The Department contends Trader Joes forfeited its APA challenge by failing to raise it before the ALJ. (See *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549 [issue not raised at administrative hearing may not be raised in later judicial proceedings].) Although Trader Joes argues the appeal to the Board was its first opportunity to challenge the ALJ’s decision on APA grounds, the same cannot be said for Louis’s alleged oral directive, which Trader Joes could have challenged in the proceedings before the ALJ.

Trader Joes alternatively argues that the APA issue may be considered for the first time on appeal because it is a legal theory raising a pure question of law on undisputed facts. But this exception to the forfeiture rule applies only when the new theory involves a legal question “determinable from facts which are not only uncontroverted in the record, but which could not be altered by the presentation of additional evidence.” (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) There is no direct evidence in the record of what Louis actually said to the store managers,⁷ and since Trader Joes did not raise the issue below, there was no occasion for the ALJ to develop the record with additional evidence and argument as to whether Louis’s statements implicated the APA. In this regard, we observe that agencies may provide private parties

⁷ There was no testimony by Louis or any of the store managers regarding their conversation with Louis or how it led to the new store policy. Boulger testified vaguely that the new policy was “per the agent” but did not provide any details as to what the agent said. Ott did not witness any conversation between Louis and store management.

with advice letters, which are not subject to the APA rulemaking provisions. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 (*Tidewater*); see also Gov. Code, § 11340.9, subd. (i) [APA’s procedures do not apply to “[a] regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state”].) Given that Ott singled out this particular store location as an “easy place” for minors to purchase alcohol, Louis’s directive (assuming it was one) may have been intended to apply only to the specific employees of this store and not to operate as a rule of general application. Because this is an issue that cannot be resolved as a matter of law on appeal, the claim is forfeited.

Trader Joes likewise fails to demonstrate that the Department’s decision itself constituted a regulation subject to the APA. Interpretations of statute that arise in the course of case-specific adjudications are not regulations subject to the rulemaking procedures of the APA. (*Tidewater, supra*, 14 Cal.4th at p. 571.) Trader Joes points to the portion of the decision stating that “[c]areful scrutiny of any identifications presented by youthful appearing students, especially when they are purchasing alcoholic beverages, was clearly warranted.” But this statement, though phrased in general terms, comes immediately after the Department’s observations about the physical irregularities in the fake license at issue and the evidence that Boulger knew Stafford was a university student. It is then followed with, “As such, *in this case*, the clerk should not have relied solely upon a cursory visual inspection of the false identification that remained inside of the minor’s wallet.” (Italics added.) Viewed in context, the statement was part of the Department’s case-specific interpretation of section 25660 and was therefore not a regulation within the meaning of the APA. (*Tidewater, supra*, 14 Cal.4th at p. 571.)

DISPOSITION

For the reasons set forth above, we vacate the decision of the Board and affirm and reinstate the decision of the Department.

Fujisaki, J.

WE CONCUR:

Siggins, P. J.

Petrou, J.

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